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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 6346

DATE COMPLAINT FILED: August 6, 2010

DATE OF NOTIFICATION: August 12, 2010

LAST RESPONSE RECEIVED: September 24,
2010

DATE ACTIVATED: February 7, 2011

EXPIRATION OF SOL: August 4, 2015

COMPLAINANT:

Bryan Lanza, Campaign Manager, Bill Binnie for
U.S. Senate

RESPONDENTS:

Cornerstone Action
Friends of Kelly Ayotte and Theodore V. Koch, in
his official capacity as treasurer

**RELEVANT STATUTES AND
REGULATIONS:**

2 U.S.C. § 431(17)
2 U.S.C. § 434(g)(2)
2 U.S.C. § 441a
2 U.S.C. § 441b
11 C.F.R. § 100.22
11 C.F.R. § 100.26
11 C.F.R. § 109.21

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

Internal Revenue Service

I. INTRODUCTION

This matter concerns allegations that Cornerstone Action, a New Hampshire-based 501(c)(4) organization, made an excessive and prohibited corporate in-kind contribution to Friends of Kelly Ayotte ("Ayotte Committee" or "Committee"), Kelly Ayotte's principal campaign committee for U.S. Senate in New Hampshire in 2010. Complainant alleges that Cornerstone Action coordinated its expenditures for a television advertisement attacking Bill

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1 Binnie, one of Ms. Ayotte's Republican Senate primary opponents, with the Ayotte Committee.
2 Complainant asserts that the Ayotte Committee was involved in the creation of Cornerstone
3 Action's advertisement because the advertisement utilizes video footage of Binnie from a public
4 event that was allegedly recorded by a former Ayotte campaign employee. Respondents
5 maintain that Cornerstone did not obtain the video footage from the Ayotte Committee, and that
6 it was publicly available material that could be downloaded from the YouTube website.

7 Because the available information does not indicate that Cornerstone Action coordinated
8 its advertisement with the Ayotte Committee, we recommend that the Commission find no
9 reason to believe that Cornerstone Action violated 2 U.S.C. §§ 441a(a) and 441b by making an
10 excessive and prohibited in-kind contribution in the form of a coordinated communication. We
11 also recommend that the Commission find no reason to believe that the Ayotte Committee
12 violated 2 U.S.C. §§ 441a(f) and 441b by receiving an excessive and prohibited in-kind
13 contribution in the form of a coordinated communication. Additionally, although not specifically
14 alleged in the complaint, we recommend that the Commission find reason to believe that
15 Cornerstone Action violated 2 U.S.C. § 434(g)(2) by failing to file a 48-hour independent
16 expenditure report for the advertisement, which expressly advocates the defeat of Mr. Binnie in
17 the upcoming Republican Senate primary. A brief investigation will be necessary to ascertain
18 information about the cost of the advertisement.

19 **II. FACTUAL SUMMARY**

20 **A. Background**

21 Cornerstone Action incorporated as a non-profit corporation in New Hampshire in 2005
22 and is organized under section 501(c)(4) of the Internal Revenue Code. See Complaint Exhibit

23 1. According to its website, Cornerstone Action is an issue-oriented advocacy group that

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1 promotes traditional values, limited government, and free markets through education,
2 information, and advocacy. See www.nhcornerstone.org. Cornerstone Action appears to
3 conduct extensive legislative advocacy within the State of New Hampshire. *Id.* The group's
4 website tracks state legislation on a variety of issues and provides information on Cornerstone
5 Action-sponsored events, including pro-life and Tea Party rallies.

6 At various times, Cornerstone Action has conducted activities in connection with both
7 federal and state elections. For example, in 2010, Cornerstone Action filed independent
8 expenditure reports for a total of \$23,298 in expenditures for radio and newspaper
9 advertisements opposing Senate candidate Bill Binnie. Cornerstone Action also conducted
10 numerous activities in connection with 2010 New Hampshire state elections, including endorsing
11 candidates for state office. See, e.g., Kevin Landrigan, "Social Conservative Group Blows
12 Jennifer's Horn," *Nashua Telegraph.com*, July 20, 2010 (available at
13 [http://blogs.nashuatelegraph.com/nhprimecuts/2010/07/20/social-conservative-group-blows-](http://blogs.nashuatelegraph.com/nhprimecuts/2010/07/20/social-conservative-group-blows-jennifers-horn/)
14 [jennifers-horn/](http://blogs.nashuatelegraph.com/nhprimecuts/2010/07/20/social-conservative-group-blows-jennifers-horn/)). Press accounts also reported that Cornerstone Action and the National
15 Organization for Marriage jointly spent \$450,000 on radio and television advertisements that
16 criticized New Hampshire Governor John Lynch in connection with the gubernatorial election
17 for signing a same-sex marriage bill. Nerran Love, "Ad Criticizes NH Gov for Signing Gay
18 Marriage Law," *Boston Globe*, October 4, 2010 (available at
19 [http://www.boston.com/news/local/new_hampshire/articles/2010/10/04/ad_criticizes_nh_gov_fo](http://www.boston.com/news/local/new_hampshire/articles/2010/10/04/ad_criticizes_nh_gov_for_signing_gay_marriage_law/)
20 [r_signing_gay_marriage_law/](http://www.boston.com/news/local/new_hampshire/articles/2010/10/04/ad_criticizes_nh_gov_for_signing_gay_marriage_law/)).

21 On August 4, 2010, Cornerstone Action began airing a television advertisement entitled
22 "The Feeling is Mutual," which criticized Bill Binnie, a candidate in the Republican primary
23 election for Senate in New Hampshire. See <http://www.youtube.com/watch?v=Aq0tSsxtJA4>.

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1 The advertisement includes several seconds of video footage of Bill Binnie displayed on a
2 television monitor with the on-screen caption, "BINNIE: 'I'm looking at a value-added tax.'
3 Speaking in Windham, New Hampshire, YouTube video posted May 20, 2010." *Id.* The
4 advertisement includes several similar video clips of Bill Binnie accompanied by on-screen
5 captions of Binnie's statements about policy issues. The advertisement is narrated by voiceover
6 with the following script:

7 Bill Binnie portrays himself as a conservative. Truth is he's shockingly liberal.
8 Binnie supports abortion to avoid the expense of disabled children. He's excited
9 about imposing gay marriage on New Hampshire. He's praised key elements of
10 Obama's healthcare bill. He's even said that he's open to imposing a European-
11 style value added tax on working families. With these shockingly liberal
12 positions, it's no wonder Bill Binnie says he doesn't like the Republican Party.
13 Now New Hampshire Republicans can tell Binnie the feeling is mutual.
14

15 Although neither the complaint nor the response indicates the amount spent on the advertisement,
16 there are press reports indicating that Cornerstone Action paid \$125,000 to broadcast it.¹ Sean
17 Sullivan, "Binnie Under Fire from Conservative Group," *Hotline on Call*, August 5, 2010
18 (available at http://hotlineoncall.nationaljournal.com/archives/2010/08/binnie_under_fi.php).

19 B. Alleged Coordination

20 The complaint alleges that Cornerstone Action coordinated its "The Feeling is Mutual"
21 advertisement with the Ayotte Committee, resulting in Cornerstone Action making, and the
22 Ayotte Committee accepting, a prohibited corporate and excessive in-kind contribution. The
23 complaint alleges that a former Ayotte Committee employee, Harold Parker, recorded the video
24 footage included in the Cornerstone Action advertisement. Complaint at 2. An attached
25 affidavit of Matt Mayberry, the Assistant Campaign Manager for Bill Binnie for U.S. Senate,

¹ With the exception of the last two sentences, the "The Feeling is Mutual" television ad is similar to a radio ad critical of Mr. Binnie that Cornerstone Action ran earlier in the summer of 2010. Available at <http://www.youtube.com/watch?v=k-25Z-mXoTk>.

1 states that he accompanied Bill Binnie to a Windham Republican Party meeting in Windham,
2 New Hampshire on April 20, 2010, and that he observed Harold Parker, who he believes to have
3 been a field director for the Ayotte campaign at the time, filming the meeting on a "flip-style"
4 video camera; and that the video footage allegedly filmed by Parker is the same footage that
5 appears in the Cornerstone Action advertisement. Complaint Exhibit 3, Mayberry Affidavit
6 at ¶¶ 4-8.

7 The complaint also alleges that Kevin Smith, the Executive Director of Cornerstone
8 Action and Cornerstone Policy Research, has long-standing personal and professional ties to
9 Kelly Ayotte, and also asserts that Smith and Ayotte worked together in the New Hampshire
10 Governor's office in 2003. Complaint at 2. The complaint argues that the relationship between
11 Smith and Ayotte makes it "reasonable to conclude" that Cornerstone Action became aware of,
12 and was provided with, the footage by the Ayotte Committee. Complaint at 5.

13 Cornerstone Action's response states that it did not obtain the video footage in its "The
14 Feeling is Mutual" advertisement from the Ayotte Committee and denies that the Ayotte
15 Committee had involvement in any of its communications. Cornerstone Action Response at 2.
16 In the response, Kevin Smith states that he does not know whether an agent of the Ayotte
17 campaign originally filmed the video footage included in the advertisement. *Id.* The response
18 explains that Cornerstone Action obtained the footage from a link to a video posted on YouTube
19 included in a news article in the *Nashua Telegraph* on May 23, 2010. *Id.* See Kevin Landrigan,
20 "Outside Opinions Disputed," *Nashua Telegraph*, May 23, 2010 (available at
21 [http://www.nashuatelegraph.com/news/statenewengland/746598-227/outside-opinions-](http://www.nashuatelegraph.com/news/statenewengland/746598-227/outside-opinions-disputed.html)
22 [disputed.html](http://www.nashuatelegraph.com/news/statenewengland/746598-227/outside-opinions-disputed.html)) and YouTube video "binnie-2.mov" (available at
23 <http://www.youtube.com/watch?v=Yterozcbsyo>).

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1 Cornerstone Action contends that because the video footage was obtained from a public
2 source, YouTube, and not the Ayotte Committee, it falls within the publicly available source
3 exception to the "material involvement" conduct prong of the coordinated communications test.
4 Cornerstone Action Response at 2. *See* 11 C.F.R. § 109.21(d)(2). The response also argues that
5 the complaint does not allege that the Ayotte Committee was materially involved in Cornerstone
6 Action's decision-making process regarding the advertisement and thus the allegation does not
7 satisfy the "material involvement" conduct prong of the coordinated communications test. *Id.*
8 at 2. *See* 11 C.F.R. § 109.21(d)(2). Finally, Smith disputes the complaint's assertion that he
9 worked with Kelly Ayotte in the New Hampshire Governor's office and that even if he had such
10 a relationship, it would not be relevant to establishing coordination. Cornerstone Action
11 Response at 1.

12 The Ayotte Committee contends that there was no coordination between the Committee
13 and Cornerstone Action. Ayotte Committee Response at 1. The Committee's response includes
14 a letter from Brooks Kochvar, a representative of the Ayotte Committee, to Bill Binnie, dated
15 August 4, 2010. *See* Ayotte Committee Response Exhibit A. The letter states that the accusation
16 of coordination between the Committee and Cornerstone Action is false and that the Committee
17 first learned of the Cornerstone Action advertisement in the press on August 4, 2010. *Id.* at 1.
18 The letter disputes the allegation that Cornerstone Action supported Kelly Ayotte, as
19 Cornerstone's Chairman endorsed another candidate in the Republican primary election. *Id.*
20 The letter further states that the Ayotte Committee did not provide the video footage in the
21 advertisement, and notes that a link to the video was included in a *Nashua Telegraph* article over
22 two months prior to the dissemination of the Cornerstone Action advertisement and was
23 available for any member of the public to download. *Id.*

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III. ANALYSIS

A. Prohibited In-Kind Contributions

Under the Federal Election Campaign Act of 1971, as amended ("the Act"), a corporation is prohibited from making any contribution in connection with a Federal election, and candidates and political committees are prohibited from knowingly accepting corporate contributions.

2 U.S.C. § 441b. During the 2010 election cycle, individuals were prohibited from contributing over \$2,400 per election to a candidate's authorized political committee and authorized committees were prohibited from accepting contributions from individuals in excess of \$2,400.

2 U.S.C. §§ 441a(a) and 441a(f). An expenditure made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents" constitutes an in-kind contribution. 2 U.S.C.

§ 441a(a)(7)(B)(i). A communication is coordinated with a candidate, a candidate's authorized committee, or agent of the candidate or committee when the communication satisfies the three-pronged test set forth in 11 C.F.R. § 109.21(a): (1) the communication is paid for by a person other than that candidate or authorized committee; (2) the communication satisfies at least one of the content standards set forth in 11 C.F.R. § 109.21(c); and (3) the communication satisfies at least one of the conduct standards set forth in 11 C.F.R. § 109.21(d). The Commission's regulations at 11 C.F.R. § 109.21 provide that coordinated communications constitute in-kind contributions from the party paying for such communications to the candidate, the candidate's authorized committee, or the political party committee which coordinates the communication.

1. Payment

The payment prong of the coordination regulation, 11 C.F.R. § 109.21(a)(1), is satisfied.

Cornerstone Action's response acknowledges that it was responsible for the advertisement at

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1 issue in the complaint. Cornerstone Action Response at 1. The advertisement's disclaimer states
2 that it was paid for by Cornerstone Action and the National Organization for Marriage.

3 **2. Content**

4 The content prong of the coordination regulation is also satisfied. The content prong is
5 satisfied if the communication at issue meets at least one of the following content standards: (1)
6 a communication that is an electioneering communication under 11 C.F.R. § 100.29; (2) a public
7 communication that disseminates, distributes, or republishes, in whole or in part, campaign
8 materials prepared by a candidate or the candidate's authorized committee; (3) a public
9 communication that expressly advocates the election or defeat of a clearly identified candidate
10 for Federal office; or (4) a public communication, in relevant part, that refers to a clearly
11 identified House or Senate candidate, and is publicly distributed or disseminated in the clearly
12 identified candidate's jurisdiction 90 days or fewer before the candidate's primary election.² See
13 11 C.F.R. § 109.21(c).

14 Cornerstone Action's advertisement identified Senate candidate Bill Binnie and was
15 broadcast on television on August 4, 2010, 41 days before the September 14, 2010 Republican
16 primary election in New Hampshire. Thus, the communication at issue in the complaint satisfies
17 the content prong by constituting a public communication referring to a clearly identified
18 candidate distributed within 90 days of an election.

19 **3. Conduct**

20 The Commission's regulations set forth the following six types of conduct between the
21 payor and the committee, whether or not there is agreement or formal collaboration, that satisfy

² A "public communication" is defined as a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank, or any other form of general public political advertising. 11 C.F.R. § 100.26.

1 the conduct prong of the coordination standard: (1) the communication "is created, produced, or
2 distributed at the request or suggestion of a candidate or an authorized committee," or if the
3 communication is created, produced, or distributed at the suggestion of the payor and the
4 candidate or authorized committee assents to the suggestion; (2) the candidate, his or her
5 committee, or their agent is materially involved in the content, intended audience, means or
6 mode of communication, the specific media outlets used, or the timing or frequency of the
7 communication; (3) the communication is created, produced, or distributed after at least one
8 substantial discussion about the communication between the person paying for the
9 communication, or that person's employees or agents, and the candidate or his or her authorized
10 committee, his or her opponent or opponent's authorized committee, a political party committee,
11 or any of their agents;³ (4) a common vendor uses or conveys information material to the
12 creation, production, or distribution of the communication; (5) a former employee or independent
13 contractor uses or conveys information material to the creation, production, or distribution of the
14 communication; and (6) the dissemination, distribution, or republication of campaign materials.⁴
15 11 C.F.R. § 109.21(d)(1)-(6).

16 The material involvement and substantial discussion standards of the conduct prong are
17 not satisfied "if the information material to the creation, production, or distribution of the
18 communication was obtained from a publicly available source." 11 C.F.R. § 109.21(d)(2) and
19 (3). *See also Explanation and Justification for the Regulations on Coordinated*
20 *Communications*, 71 Fed. Reg. 33190, 33205 (June 8, 2006) (explaining that "[u]nder the new

³ A "substantial discussion" includes informing the payor about the campaign's plans, projects, activities, or needs, or providing the payor with information material to the communication. *See* 11 C.F.R. § 109.21(d)(3).

⁴ The last standard applies only if there was a request or suggestion, material involvement, or substantial discussion that took place after the original preparation of the campaign materials that are disseminated, distributed, or republished.

1 safe harbor, a communication created with information found . . . on a candidate's or political
2 party's Web site, or learned from a public campaign speech . . . is not a coordinated
3 communication"). However, to qualify for the safe harbor for the use of publicly available
4 information, the person or organization paying for communication "bears the burden of showing
5 that the information used in creating, producing or distributing the communication was obtained
6 from a publicly available source." *Id.* As one way of meeting this burden, the person or
7 organization paying for the communication may demonstrate that the information used in the
8 communication was obtained from a publicly available website. *Id.*

9 Cornerstone Action has demonstrated that the video footage of Bill Binnie used in its
10 advertisement was obtained from a publicly available source, specifically a video on the
11 YouTube website that was posted on May 20, 2010, and referenced in a news article in the
12 *Nashua Telegraph* several days later. The YouTube website indicates that the video was
13 uploaded by a user named "nhvoter," and there is no indication on the YouTube website that this
14 user was associated with the Ayotte campaign. See
15 <http://www.youtube.com/watch?v=Yterozcbsyo>.

16 Both Cornerstone Action and the Ayotte Committee have specifically denied that
17 Cornerstone Action obtained the footage from the Ayotte Committee and there is no information
18 to suggest otherwise. Additionally, the available information does not indicate that the Ayotte
19 Committee was materially involved in any decisions regarding Cornerstone Action's
20 advertisement.

21 The available information also does not indicate that the various other tests for the
22 conduct prong were satisfied. There is no available information indicating that the Cornerstone
23 Action advertisement was created at the request or suggestion of the Ayotte Committee, that the

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1 Ayotte Committee was materially involved in the content or distribution of the advertisement,
2 or that the advertisement was created after a substantial discussion about the communication
3 between representatives of Cornerstone Action and the Ayotte Committee. There is nothing to
4 suggest that Cornerstone Action and the Ayotte Committee shared a common vendor or that a
5 former Ayotte Committee employee worked with Cornerstone Action on its advertisement.
6 There is also no basis on which to conclude that the footage would constitute republication of
7 campaign material, because the available information does not establish that the video footage
8 constituted Ayotte Committee campaign materials. Accordingly, we recommend that the
9 Commission find no reason to believe that Cornerstone Action violated 2 U.S.C. §§ 441a(a) and
10 441b by making an excessive and prohibited in-kind contribution in the form of a coordinated
11 communication. We also recommend that the Commission find no reason to believe that Friends
12 of Kelly Ayotte and Theodore V. Koch, in his official capacity as treasurer, violated 2 U.S.C.
13 §§ 441a(f) and 441b by receiving an excessive and prohibited in-kind contribution in the form of
14 a coordinated communication.

15 **B. Reporting Issues**

16 Cornerstone Action did not file an electioneering communications or independent
17 expenditure report for its "The Feeling is Mutual" television advertisement. The complaint
18 included all relevant facts about this apparent violation and provided notice of these facts to
19 Cornerstone Action, although it did not specifically allege a section 434(f) or section 434(g)
20 reporting violation. It appears that the advertisement aired outside the period for which an
21 electioneering communications report would be required. However, because the ad expressly
22 advocated the defeat of Bill Binnie in the upcoming Republican Senate primary, Cornerstone
23 Action was required to file an independent expenditure report.

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1. Electioneering Communications Reporting

Under the Act, every person who makes a disbursement for the direct cost of producing and airing electioneering communications aggregating \$10,000 or more during a calendar year must file a report that discloses information about its electioneering communications and identify each person who made a contribution in excess of \$1,000 to the person making the disbursement, if the disbursement was not paid out of a segregated fund. 2 U.S.C. § 434(f). For the purposes of this reporting requirement, an electioneering communication is defined as any broadcast, cable, or satellite communication that refers to a clearly identified candidate for Federal office that is made within 30 days before a primary election for the office sought by the candidate. 2 U.S.C. § 434(f)(3). Cornerstone Action was not required to file an electioneering communications report for its advertisement because it aired 41 days before the New Hampshire Republican primary election, which is outside of the relevant timeframe.

2. Independent Expenditure Reporting

Under the Act, every person other than a political committee who makes independent expenditures in excess of \$250 must file a report that discloses information on its expenditures and identify each person who made a contribution in excess of \$200 for the purpose of furthering an independent expenditure. 2 U.S.C. § 434(e). A person that makes independent expenditures aggregating \$10,000 or more at any time up to and including the twentieth day before the date of an election must file a report describing the expenditures within 48 hours. 2 U.S.C. § 434(g)(2). The Act defines an independent expenditure as any expenditure that expressly advocates the election or defeat of a clearly identified candidate and is not made in concert with a candidate, a political party committee, or their respective agents. 2 U.S.C. § 431(17).

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The Commission has defined express advocacy in the regulations set forth at 11 C.F.R.

§ 100.22. Under Section 100.22(a),

Expressly advocating means any communication that – (a) uses phrases such as “vote for the President,” “re-elect your Congressman,” “support the Democratic nominee,” “cast your ballot for the Republican challenger for U.S. Senate in Georgia,” “Smith for Congress,” “Bill McKay in '94,” “vote Pro-Life” or “vote Pro-Choice” accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, “vote against Old Hickory,” “defeat” accompanied by a picture of one of more candidate(s), “reject the incumbent,” or communications of campaign slogan(s), or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say “Nixon’s the One,” “Carter ’76,” “Reagan/Bush” or “Mondale!”

11 C.F.R. § 100.22(a). Under Section 100.22(b), express advocacy may also consist of a communication,

When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because— (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22(b).

In MUR 5831 (Softer Voices), the Commission found reason to believe that the advertisement at issue was express advocacy under both 11 C.F.R. § 100.22(a) and (b) where the advertisement depicted Senator Rick Santorum and his electoral opponent Bob Casey, attached Casey’s qualifications and praised Santorum’s, and concluded “Can we really risk Bob Casey learning on the job? The Commission reasoned that the ad was express advocacy under section 100.22(a) because it identified a candidate and referenced the office of Senator when it referred to a “job.” The Commission concluded that the only way that a viewer could “risk Bob Casey learning on the job” would be by voting for him for the “job” of Senator, and thus the ad

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1 exhorted viewers to defeat Casey. *See* MUR 5831 Factual and Legal Analysis at 8. The
2 Commission also concluded that the use of "risk" as a verb in the sentence was equivalent to the
3 use of verbs such as "vote for" or "elect." *Id.*

4 Cornerstone Action's "The Feeling is Mutual" advertisement is an independent
5 expenditure as defined by the Act because it expressly advocates the defeat of Bill Binnie. After
6 discussing Bill Binnie's statements made in the context of the Republican Senate primary
7 campaign, and labeling Binnie's policy positions as "shockingly liberal," the advertisement
8 states, "It's no wonder Bill Binnie says he doesn't like the Republican Party. Now New
9 Hampshire Republicans can tell Binnie the feeling is mutual."

10 This advertisement contains express advocacy under 11 C.F.R. § 100.22(a) because it
11 uses individual words that in context can have no reasonable meaning other than to urge the
12 defeat of Mr. Binnie in the upcoming Republican Senate primary. Cornerstone Action's ad
13 attacks Binnie's positions, notes Binnie's statement that he doesn't like the Republican Party and
14 concludes by exhorting the listener, "Now New Hampshire Republicans can tell Binnie the
15 feeling is mutual." This identifies a candidate, references the upcoming primary by calling for
16 "New Hampshire Republicans" (the only persons eligible to vote in that election in which Binnie
17 was on the ballot), and it calls for them now to take an action. That action is to "tell Binnie the
18 feeling is mutual [*i.e.*, that they do not like him]." Similar to the Commission's conclusion that
19 the only way that a viewer could "risk Bob Casey learning on the job" would be by voting for
20 him for the "job" of Senator in the Softer Voices advertisement, the only way that a New
21 Hampshire Republican could now "tell Binnie the feeling is mutual" is to vote against him in the
22 primary. Thus, the ad exhorts viewers to tell Binnie they do not like him by casting a vote
23 against his nomination. In this context, the use of "tell" as a verb in the sentence, like the use of

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1 "risk" as a verb in the Softer Voices communication, is equivalent to the use of verbs such as
2 "vote for" or "elect."

3 The advertisement also contains express advocacy under 11 C.F.R. § 100.22(b). The
4 statement "Now New Hampshire Republicans [who are eligible to vote in the Republican Senate
5 primary] can tell Binnie the feeling is mutual [*i.e.*, that they do not like him]" is an unmistakable
6 and unambiguous reference to the upcoming New Hampshire Republican primary election.
7 Because reasonable minds could not differ as to whether the exhortation to "tell Binnie the
8 feeling is mutual" encourages action to defeat Binnie by voting against him in the primary
9 election, the advertisement constitutes express advocacy under section 100.22(b).

10 Although Cornerstone Action filed reports for other independent expenditures totaling
11 \$23,298 in August and September 2010, including \$5,127.50 for a newspaper advertisement
12 opposing Bill Binnie and \$18,170.50 for a radio advertisement opposing Bill Binnie,
13 Cornerstone Action did not file an independent expenditure report for "The Feeling is Mutual"
14 advertisement. Press articles reported that Cornerstone Executive Director Kevin Smith stated
15 that the ad buy for "The Feeling is Mutual" was \$125,000. Sean Sullivan, "Binnie Under Fire
16 from Conservative Group," *Honline on Call*, August 5, 2010 (available at
17 http://honlineoncall.nationaljournal.com/archives/2010/08/binnie_under_fire.php). Thus, it appears
18 that Cornerstone Action spent over \$10,000 in connection with "The Feeling is Mutual"
19 television advertisement and was therefore required to file an independent expenditure report
20 within 48 hours of the expenditure. Accordingly, we recommend that the Commission find
21 reason to believe that Cornerstone Action violated 2 U.S.C. § 434(g)(2).⁵

⁵ We do not make any recommendations regarding the fact that Cornerstone Action did not register and report as a federal political committee, because there is no indication that its major purpose was federal campaign activity. See

1 **IV. PROPOSED INVESTIGATION**

2 This matter will require a very brief investigation in order to obtain information about the
3 cost of Cornerstone Action's "The Feeling is Mutual" advertisement. We expect that we would
4 be able to obtain this information through informal discovery. In the event that it becomes
5 necessary to utilize formal discovery, we recommend that the Commission authorize the use of
6 compulsory process.

7 **V. RECOMMENDATIONS**

- 8 1. Find no reason to believe that Cornerstone Action violated 2 U.S.C. §§ 441a(a) and
9 441b.
10
11 2. Find no reason to believe that Friends of Kelly Ayotte and Theodore V. Koch, in his
12 official capacity as treasurer, violated 2 U.S.C. §§ 441a(f) and 441b.
13
14 3. Find reason to believe that Cornerstone Action violated 2 U.S.C. § 434(g)(2).
15
16 4. Authorize the use of compulsory process as to all Respondents and witnesses in this
17 matter, including the issuance of appropriate interrogatories, document subpoenas,
18 and deposition subpoenas, as necessary.
19
20 5. Approve the attached Factual and Legal Analyses.
21

6. Approve the appropriate letters.

Christopher Hughey
Acting General Counsel

Kathleen M. Guith
Acting Associate General Counsel for
Enforcement

June 21, 2011
Date

BY:

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